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Case No. 882

IN THE SUPREME COURT OF THE UNITED STATES

ENTERPRISE INDUSTRIES, INC.

Petitioner,

v.

THE TEXAS COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WALLACE R. BURKE
Counsel for Petitioner.

JOHN M. CASEY
JOHN J. DALY
SAMUEL STEINBERG
Of Counsel.

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Enterprise Industries Incorporated prays that a writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit reversing the judgment in favor of the petitioner for damages suffered as a result of the violations by the respondent of the Clayton Act as amended by the Robinson Patman Act.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported, and can be found in the appendix.

The opinion of the District Court is reported at 136 F. Supp. 420.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1957. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, the plaintiff is limited in his recovery to the net loss of profit once a price discrimination, in interstate commerce, which discrimination may substantially affect competiton and which discrimination caused damage to the plaintiff has been established, and which the defendant fails to justify.

2. Whether in the above circumstance the correct and sole measure of damages is the loss of profits.

STATUTES INVOLVED

The statutes involved in this dispute are as follows:

Sec. 2(a) of the Robinson-Patman Act[1] [15 U.S.C. Sec. 13(a)] wherein the pertinent parts provide as follows:

"It shall be unlawful for any person engaged in Commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monoply in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them . . . . ."

Section 2(b) of the Robinson-Patman Act [15 U.S.C. Section 13 (b)] provides pertinently hereto:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case

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[1] For convenience, the designation "Robinson-Patman Act" has been used to describe the Clayton Act as amended by the Robinson-Patman Act.

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, However,* that nothing contained in sections 12, 13, 14-21 and 22-27 of this title shall prevent a seller rebutting a prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers *was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*"

Title 15, U.S.C. Section 15 provides as follows:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee".

STATEMENT

In May, 1949, Daniel J. Raymond, by written instrument, leased from the defendeant, The Texas Company, a gasoline service station located at the notherly end of the Berlin Turnpike in the Town of Wethersfield, Connecticut. This lease ran for a period of one year commencing June 1, 1949 and thereafter was self-renewing for additional one year periods, subject to termination at will as of any renewal date upon writen notice of either party to the other ten days prior to the renewal date. (Fdg 1 & 2)

In November, 1949, the plaintiff corporation, Enterprise Industries, Inc., was organized. Daniel J. Raymond was President and Tresasurer of the corporation. (Fdg 3)

On March 21, 1950, Enterprise entered into a written lease with defendant, Texaco for the lease of the gasoline station located on the Berlin Turnpike, Wethersfield, Connecticut, which station prior thereto, Daniel J. Raymond had been operating as an individual. (Fdg 1 & 2). This lease ran for a period of one year commencing June 1, 1950 and thereafter was self-renewing for additional one year

periods, subject to termination at will of either party on the renewal date upon written notice being given by either party to the other ten days prior to renewal date. (Fdg 4)

This written lease between Enterprise and Texaco ran until June 1, 1951 when shortly thereafter Texaco gave notice to Enterprise of its decision not to renew the lease upon the renewal date of June 1, 1952. Upon agreement, however, Enterprise remained in possession for an additional ten days in June, 1952. (Fdg 5).

The leases provided for the payment of a monthly rental measured in part by the number of gallons of gasoline delivered to Enterprise by Texaco at demised premises. (Fdg 6).

At the time of the execution of the first lease, Daniel J. Raymond, individually, entered into an agreement whereby Raymond agreed to purchase Texaco gasoline and motor oils; and at the time of the second lease, and to run concurrently therewith, Enterprise and Texaco entered into the same type agreement whereby Enterprise agreed to buy Texaco Gasoline, oils and lubricants. (Fdg 7) (Defts. Ex. 2) (Defts. Ex. 3).

The gasoline station involved here, operated by Enterprise for the period June 1, 1950 to June, 1952, was located on the Berlin Turnpike, Wethersfield, Conn., it being the first gasoline station on the right hand side of the highway going south which highway was a part of the dual lane highway leading form the north through Hartford to New Haven and New York. (Fdg 10). This station is on the highway onto which traffic from Wethersfield, Newington, Meriden and Berlin flows into Hartford via Conlon Highway, via Maple Avenue, via Wethersfield Avenue, and via Franklin Avenue. Further, persons employed in East Hartford, at United Aircraft Corporation, residing in Berlin, Newington, Meriden, New Britain and parts of Wethersfield use this highway on their way to and from their work, passing the gasoline station formerly operated by Enterprise. Persons from the towns mentioned also use this highway, passing the gasoline station, entering Hartford via Wethersfield Avenue, Maple Avenue and Franklin Avenue to go to their place of employment at the many insurance company offices and factories in Hartford and West Hartford. (See map Dfts Exhibit 4) Fdg. 22. (Transcript App. Pg. 52) Transcript of Evidence Appendix Pages 306, 307, 308, 309, 310.

The business done with such people in the area above specified accounted for a substantial portion of the total business done by Enterprise and about 10% of its business was done with customers living in the immediate neighborhood of the station. (Fdg 22 & 23).

Enterprise did a major portion of its business with transient traffic coming south along the Wilbur Cross Highway. There were no gas stations north of Enterprise for a considerable distance. It was the first station met by a southbound traveller on the Wilbur Cross Highway. The traveller would not be aware of any "gas wars", so-called, going on among stations to the south of Enterprise. (Fdg. 26 & 27). The price charged for gasoline by Enterprise at its station was not unduly high nor would a traveller pay more than the standard price even though some stations to the south on the highway might be selling at a lower price.

Enterprise was in competition with other Texaco stations for the business of customers commuting from the area of Meriden, New Britain, Newington, Berlin and parts of Wethersfield which customers used the highway on which its station was located and later passed other Texaco stations in East Hartford, Hartford and West Hartford on their way to their places of employment. (Fdg 35). These stations were those of Pike, Dewolfe, Lamphier, Pierson, Sylvestre, Frank & Daly, Axelrod, Coiro and Martin. (Fdg 35) (See map Dfts. Ex. 4). (Transcript of Evidence, Appendix Pages 305-310 incl.)

These stations sold Texaco products including gasoline the price of which was posted and could be seen by any passing customer from the area of the Enterprise station. Every such customer could therefore compare the price of Enterprise with that of the other competing Texaco stations. The quality of the gasoline being identical, the brand name the same, the customer was induced to buy on price alone.

As for the stations immediately south of Enterprise on the Berlin Turnpike, no customer could ascertain the price until having passed Enterprise station. Thus, these stations were not competing on a price level but only on a brand name level with Enterprise. (Fdgs. 10, 11, 12). Thus, if a traveller used any brand name gasoline other than Texaco, he would buy at the other stations, but if he were a Texaco gasoline user, the other brand names would not induce him to purchase.

Prices did not enter into it because the customer would not have a price comparison until having passed the station of Enterprise. (Fdg 12).

All of the Texaco stations named above are located on highways and streets over which customers from the Enterprise area would pass on their way to work or business and were in direct competion with Enterprise for the trade of these commuting customers. (Fdgs. 20, 22) (See map, Dfts Exhibit 4).

In the area where the Enterprise gasoline station was located, there was a growing community of homes and developments. This growth existed between the Silas Deane Highway and the Berlin Turnpike. People residing in these homes would normally be employed in the Hartford area. (Transcript Appendix Pg. 120).

During the periods of 1949-1952, inclusive, there were from time to time, so-called "gas wars". These "gas-wars" resulted from some retail dealer, and it was not determined as to what brand, drastically reducing his price of gasoline. These "gas wars" commenced usually in the Connecticut Boulevard Section of East Hartford and spread rapidly throughout the Hartford area, including the Berlin Turnpike. (Fdg. 9).

The defendant company, Texaco, during these "gas wars", evolved a plan of discounts for dealers. These discounts were not given all dealers but only those that Texaco felt should have them. (Transcript of Evidence, App. Pg. 85).

Under the Texaco plan, the salesman would request a letter from the retail dealer asking for the discount. (Fdg 14).

These letters once received, were used on subsquent occasions to grant discounts to the various Texaco dealers who requested it. (Transcript of Evidence, Appendix Pg. 187).

Texaco claimed that the discounts were based on the individual gasoline station owner's need to keep him in business, (Transcript of Evidence, Appendix Pages 145, 146-149) but testimony from officials of Texaco and Texaco records proved that the identical allowance was given at least eight stations all over the Hartford area on various dates. (Transcript of Testimony, Appendix Pages 145, 146, 149).

These allowances were given from June 30, 1951 to May 31, 1952 to many Texaco stations in the Hartford Area, which area includes East Hartford and West Hartford, but no allowance or discount of any kind was given or offered to Enterprise. (Transcript of Evidence, Page 149, Appendix Page 149).

The rebates given by Texaco were not posted by the company and were not shown to have been given by any marking or notation on the gasoline delivery invoice. Only the tank wagon price was shown on the invoice. Rebates were given by remitting a check to the retail dealer at the end of a given period. Only the individual dealer and Texaco could know what rebate was given. (Transcript of Evidence, Appendix Pages 311-312).

If the dealer given the rebate failed or refused to reduce his price to the level desired by Texaco, the rebate was denied him. (Fdg. 18) Transcript of Evidence, Appendix Page 187).

In June, 1951, Enterprise decided to sell its gas at a normal price to return it a fair profit. At this time, Texaco, though giving allowance to other dealers cut off the rebates to Enterprise. (Fdg. 28, 29).

Rebates were given various Texaco dealers in competition with Enterprise for Texaco brand customers to insure them a profit return of 3½ cents per gallon on "Fire Chief" and 4 cents per gallon on "Sky Chief" the premium Texaco gasoline.

From June, 1951 to June, 1952, Enterprise sold gasoline at its normal price level without regard to "gas war" prices. Texaco officials during this period, repeatedly threatened Enterprise with loss of its lease and forcing it out of business, unless it reduced its price to level Texaco officials thought it should be (Fdg 28) (Transcript of Evidence, Appendix Pages 229, 238, 239, 240, 243).

When Enterprise prices were higher, June, 1951 to June, 1952, the period when no allowances was given to it, though given to other Texaco dealers, Enterprise lost regular customers who told Raymond that they were buying gas at other Texaco stations because they could buy it there at lower prices. (Transcript of Evidence, Appendix Pages 23, 201).

Records in evidence showed that during June, 1951 to June, 1952, the sales of Enterprise showed a consistent drop in volume while other Texaco stations competing with Enterprise showed a corresponding increase in volume. (Transcript of Evidence, Appendix Pages 125, 126, 127, 129 130, 131).

During the periods when allowances were given the nine competing stations and none given to Enterprise, Enterprise lost the differential given to other competing stations on many gallons of both "Fire Chief" and "Sky Chief" gasoline. The total amount so lost in profits alone, by stipulation, amounted to $1,982.91 on "Fire Chief" gasoline sales and $2,656.23 on "Sky Chief" sales. (See Stipulation, Appendix Page 391-393 incl.). This does not compensate plaintiff, Enterprise, for the loss of regular customers and the profits lost from sales that could have been made to them.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In not following statements and precedents this Court and the Courts of other circuits relating to the measure of damages.

2. In enunciating a rule that is not practicable thereby rendering the legislation in question nugatory.

3. In setting down an unworkable and impracticable rule concerning the measure of damages when it is obvious that since the plaintiff could have used the price difference of the discrimination to whatever advantages he wished, that the plaintiff has been injured *at least* to that extent.

4. In enunciating a rule of the measure of damages that deals solely with profit and loss and does not take into account items such as future effect on business, good will, ability to finance improvements, money available for advertising and other very important factors related to business life.

5. In placing a burden of proof upon one who does not have access to the information required to sustain such a burden; while the other party to the suit does have access to the information required and said other party also has the power to supress such information.

6. In enunciating a rule that would allow a defendant to profit from an acknowledged price discrimination that has resulted in damage to the plaintiff merely because the plaintiff fails to enumerate each iota of damage as required by a complex measure of damages rule.

7. In placing a burden of proof of damages that would entail long preparation for suit during a period of apparent harmony between buyer and seller; such a rule would be tantamount to requiring the plaintiff to set a trap for the defendant.

8. In dismissing the complaint.

9. In reversing the District Court.

REASONS FOR GRANTING THE WRIT

The Court below, in enunciating its complex rule has acted contrary to the rule that this Court has mentioned and the rule followed in other circuits. In *Bruces Juices, Inc. vs. American Can Co.*, 330 U. S. 743 (1946), this Court after ruling that illegal price discrimination could not be used as a defense to notes which had the discriminating prices as their consideration, said by way of indicating the applicable remedy for such prices, that barring extraordinary circumstances, the buyer was damaged at least to the extent of the discriminating prices and damages should be sought in a separate suit. The buyer did sue in a separate action for treble damages for injury suffered as the result of price discrimination in violation of the Robinson Patman Act. The District Court ruled that the difference in price was a damage but that in addition the plaintiff was entitled to recover for any other damage sustained such as loss of business, failure to expand as expected and injury to good will. *Bruces Juices vs. American Can Co.*, 87 F Supp 985 (D. Fla. 1949) The Court of Appeals affirmed the decision. *American Can Co. vs. Bruces Juices*, 187 F 2d 919 (5th cir 1951) cert. dismissed 342 U. S. 875 (1946).

In *Elizabeth Arden Sales Corp. vs. Gus Blass Co.* 150F 2d 988 (8th cir. 1945), cert denied 326 U.S. 773 (1945), the discrimination alleged was that the defendant paid one-half the salary of a clerk

in the store of the plaintiff so that such clerk would give special sales emphasis to products of the defendant, while unjustifyably paying the full salary of a clerk for the same services, in a store that competed with the plaintiff. The Court upheld the trial court's finding that the plaintiff was damaged to the extent of the difference in the allowances. In *American Can Co. vs. Russellville Canning Co.*, 191 F2d 38 (8th cir. 1951), this same court said that the price differential was the usual measure of damage but that in that particular case, the plaintiff had failed to show any damage proximately resulting from the defendant's conduct. Thus the Court did not deviate from its earlier measure of damage; it merely found that there had been no damages sustained therefore nothing to measure.

In *American Cooperative Serum Ass'n vs. Anchor Serum Co.* 153 F 2d 907 (7th cir. 1946), cert. denied 329 U.S. 721 (1946), which involved a suit for illegal price cutting, the Court held that the price difference was a correct measure of damages. In *Reid vs. Doubleday*, 136 F Supp 337 (N.D. Ohio W.D. 1955) a District Court of the Sixth Circuit ruled that one of the measures of damage was the difference between the prices at which the defendant sold to the plaintiff as compared to prices at which the defendant sold to others.

In *Sun Cosmetic Shoppe vs. Elizabeth Arden Sales Corp.* 178 F2d 150 (2d cir. 1949), the Second Circuit Court had occasion to consider the situation involving different amount being paid by the defendant toward the salary of a clerk of the plaintiff and of the plaintiff's competitors for identical services to the defendant. The court held that the difference in salary was merely the top possible limit of damages and not the measure of damage; that loss of business was the only proof of damages. The Court apparently used proof of damage to mean measure of extent of damage once the fact that the plaintiff was damaged had been established. In the present case, the Court below said that assuming the plaintiff had proved its case, the measure of damage would be any gross loss of profit of any sales to particular customers lost to competitors of the plaintiff, adjusted by any profit gained by setting a higher price than that demanded by the defendant as a condition for receiving the discounts. The Court below rejected the rule that the difference in price is a proper measure of damage.

By so doing the Court below has squarely adopted a view contrary to one indicated by this Court (*Bruces Juices, Inc. vs. American*

Can Co., 330 U.S. 743 (1946). The Court below has adopted a rule contrary to the one used in the Fifth, Sixth, Seventh and Eighth Circuits, thus confusing the law applicable to this point and preventing uniform treatment of this point throughtout the federal system.

The purpose of the Robinson Patman Act was and is to preserve the independence of the small merchants; to protect the small businessman from large businesses which have many advantages (Austin, Prices Discrimination and Related Problems Under the Robinson Patman Act 11, ALI 1953) business does not have the resources which would enable it to maintain the detailed cost analyses necessary to establish damages under the rule stated by the Court below. A small business is even less equipped to analyse his competitors' business in order to show significant trends. Therefore, it can be seen that the persons, for whose benefit the Robinson Patman Act was passed, would be unable to invoke its protection and remedies if the rule enunciated by the Court below is allowed to stand. The gigantic size of many business combines today and the fantastic resources at their control demonstrate that more than ever some protection is needed if the small business is to continue to play its historically vital role of doing somethings better, and of providing outlets for our citizens' genius. The Rule of the Court below will render the Robinson Patman Act nugatory. Obviously such a rule cannot stand in the face of the clear design of Congress. *U.S. v. Menasche*, 348 U.S. 528 (1954), *Universal Camera Corp v. N.L.R.B.*, 340 U.S. 474 (1950), *Shapiro vs. U.S.*, 335 US 1 (1947).

The Court below erred in setting up an unworkable and impraticable rule concerning the measure of damages especially when a rule utilizing the difference in price as a measure is so obviously correct and workable. If a person has been charged a higher price then his competitors for similar articles, and injury results, one of the damages that must have occurred is a monetary damage equal to the difference in price. The person injured could have used the money to whatever advantage he deemed best; it could have been used to lower prices, or for advertising, or for improvements, or for additional services or for whatever best suited the particular circumstances. It is true that additional damage could have been suffered but at least this one amount of damage is known. This concept is the one that this Court mentioned, *Bruces Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1946), and the the Fifth, Sixth, Seventh, and Eighth Circuits use. The Court below erred in not following it.

The rule concerning the measure of damages as enunciated by the Court below takes into account as relevant only immediate profits and losses. It is obvious that the damage resulting from discrimination can have much more far reaching effects. It can have a profound effect upon future business; it can have a devastating effect upon ability to finance improvements; by forcing the victim to operate on a close budget, it can cripple the ability to make gratiutous gestures which is a foundation of good will; it can drain away all money available for advertising; and it can hamper other very important factors relating to business life. Such a rule is too restrictive. It does not allow the plaintiff his full measure of damage. Such a rule would allow a seller to be very discriminating for a short time with a telling effect and to cease discriminatory practices as soon as the victim's profits begin to drop and thus be liable for only a relatively small amount in relations to the harm caused. Such a rule is not a realistic rule and has no place in a living code of law that is used in a practical society.

One consideration that the law has used when placing a burden of proof upon one party or another is the ability of that party to be able to gather the component pieces of information that go to form the proof, *Greenleaf's Lessee v. Birth*, 31 U.S. 302 (1832). Although such a consideration is not always possible, in the absence of a statutory placing of the burden of proof, a court should not place it upon the party who is less apt to be able to gather the facts in question. Yet, that is exactly what has been done by the court below. In such cases as the present one, the plaintiff has no common dealings directly with all competitors. But the defendant not only has dealings with all in question but does so as a supplier of stock in trade and deals from a position of strength. The defendant would have some of the information desired as a part of its own records and could demand the balance from its customers. By a similar token, the defendant could request that its customers cooperate as little as possible in giving such information. A rule such as this has no place in a system of justice that tries to place the equities where they may do the most good and the burdens where they can be best absorbed.

It is an elementary practice of law that a wrongdoer should not be allowed to profit from his own wrong. It is equally true that a victim should not be deprived of his redress merely for a lack of complete detail concerning his injury, *Eastman Kodak Co. v. Southern*

Photo Materials Co., 273 U.S. 359 (1927). However, the rule of the court below would allow a plaintiff who has been a victim of price discrimination resulting in damage, to fail in his recovery merely because said plaintiff cannot muster each iota of damage as required by a complex measure of damage rule. Such a rule is contrary to American concepts of justice and should not be allowed to be controlling.

The rule of the measure of damages as set down by the court below is so complex in its required tabulation that it would require long preparation on the part of the plaintiff during a period when dealings between plaintiff and defendant were at least bearable. The plaintiff would have to prevent defendant from knowing of such preparation or else the defendant would sever relations where ever possible. The plaintiff would have to maintain a facade of doing business as normal but all the while the plaintiff would have to be placing orders with an eye toward incurring damage that could be enumerated precisely. Such a rule would have the effect of requiring the plaintiff to lie in wait for the defendant and construct his case rather than merely find that he is the victim of discrimination and pursuing his remedy. Such a rule should not be tolerated by a legal system that exists to aid men in their conduct rather than encourage men toward litigation.

Assuming, arguendo, that the rule concerning the measure of damages enunciated by the court below is correct, the complaint should not have been dismissed. The plaintiff, in establishing his damages was guided by the decisions mentioned above and therefore did not itemize each injury. If the rule of the court below be accepted, the cause should be remanded to the district court to afford the plaintiff the opportunity to establish an itemized list of damages.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of Certiorari should be granted.

WALLACE R. BURKE,
Counsel for Petitioner.

JOHN M. CASEY
JOHN J. DALY
SAMUEL STEINBERG
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

HAND, *Circuit Judge:* Medina, Learned

The defendant appeals from a judgment for the plaintiff in an action tried to a judge, awarding treble damages suffered by the defendant's violation of the Robinson-Patman Act (§13(a), Title 15, U. S. C.). The plaintiff was a corporation, operating a gasoline "filling station" in the town of Wethersfield, Connecticut, on the right hand side, going south, of the main highway from Boston to New York, a short distance south of the boundary of Hartford. During the period in suit it was a lessee of this station from the defendant at a rent that for the purposes of this action may be taken as two cents for every gallon of gasoline sold. It is not uncommon in the industry for a filling station to start what has come to be known as a "gas war"; that is, to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their price to their own competing stations. In the neighborhood of the city of Hartford between November 1950 and February 1952, two such "wars" occurred: the first lasted from November 1950 to July 1951; the second from November 1951 to February 1952. In each period the defendant by a rebate or allowance reduced its selling price to its tributary stations enough to enable them to meet a price cut, and yet to keep a net margin to each of two cents.

During a price war different prices prevail in different areas, dependent apparently upon the relative advantage of position of the stations. Moreover, as it was the defendant's practice not to underbid the prices of other producers, it imposed as a condition upon any allowance or rebate that its stations should not undercut the prevailing price for other brands. Thus it followed that, although the defendant cut its price enough to allow Texaco stations to meet the reduction, its price to a station, which like the plaintiff's was in an area of higher prices, was higher than its price to Texaco stations

in areas of lower prices. This was the discrimination of which the plaintiff complained, for it alleged that a greater allowance was extended to Texaco stations that were in competition with itself.

The larger part of the plaintiff's sales were to cars coming from points east of Hartford and bound south; and, as there were no stations of any kind for about forty miles to the east on the main highway, the plaintiff enjoyed as to this through traffic an important advantage. On the other hand Judge Smith found that there were nine Texaco stations so situated that they did compete with the plaintiff for local sales, by which he meant sales to cars of workmen and others that commuted back and forth from Hartford, in some cases for a distance of twenty miles or more. Such buyers were advised of the prices posted by the different stations as they passed, and would select the lowest. This finding the defendant challenges as "clearly erroneous" because the testimony was not definite that these stations did compete with the plaintiff, but at most proved no more than that there might be such competition.

However, even though we were to agree that the finding was right, and that for that reason the plaintiff had proved its claim for relief, we do not think that it proved the amount of its damages, or indeed that it suffered any damages at all. The wrong was in selling gasoline to the nine Texaco competitors at a lower price than to the plaintiff; and a distinction should be made at the outset between the first "gas war"—November 1, 1950 to July 1951—and the second —November 1951 to February 1952. During the second the plaintiff refused to accept any allowance or rebate and in consequence was free to charge what it could get for gasoline. The equation measuring its loss in that period may therefore be stated as follows. The gross loss was the profit on any sales that it would have made to the nine competitors' customers whom it could, and would, have retained, had it been able to buy from the defendant at the same price as the competitors. From this must, however, be deducted what added profit it may have got by being free to charge what it chose, particularly in the through traffic where there was little competition. Moreover, we have no reliable figures from which to appraise either the gross loss or the gain, for the plaintiff has not shown how much of the business of the nine Texaco competitors it would have retained or obtained at the same price as they; and equally we do not know what would have been its profit on the south bound through traffic if it had sold at the prevailing prices.

So much, therefore, for the second "war." During the first the plaintiff had had the advantage of the rebate or allowance, but had been obliged to sell to all customers at the prices prevailing in its area, as well as to pay a higher price than the nine. Of course the profit gained by means of the rebate or allowance may have been less than that lost by the lower prices granted to the nine together with the lower prices required to meet the prevailing prices in the through traffic; but it is impossible to know whether that was so, and even more impossible to appraise what the loss was, if there was any. The plaintiff kept no books from which it could be learned what were its profits from either part of its business, and even if it had, there was uncontradicted evidence that in June of 1951 the plaintiff was not charging the prevailing price. Moreover, the "wire recording" of the interview between Raymond, the plaintiff's president, and two of the defendant's officers, leaves no doubt that in that month they were complaining to him of his failure to conform. For these reasons we hold that there was also no evidence that would have sustained a finding as to the plaintiff's loss during the first "war."

The judge proceeded by an entirely different method; he assessed the damages by accepting as the measure of the plaintiff's loss the difference between the sale price charged the plaintiff and the lowest price charged any of the nine Texaco stations. For this he relied upon the decision of the majority of the Eighth Circuit in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988. In *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150, we held that the discrimination was not a proper measure of the loss; and the Eighth Circuit appears to have overruled its earlier view in a second majority decision, *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38. There remains, however, a passage in the opinion of the Supreme Court in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 757, in which Justice Jackson said that, if the buyer showed that the prices charged were "discriminatory, * * * it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." The question then before the court was whether discrimination should bar a seller from recovering the contract price from the buyer and should confine him to a recovery on a *quantum meruit*; and the passage quoted was only an answer to the buyer's argument

that, unless he was allowed to disaffirm the sale, he would be without any other relief. In that case the addition of 5% to the cost to the plaintiff of its cans, even if coupled with relief from "delivery charges" (155 Fla. 877) might well not have been passed on to the consumer, and have been absorbed by the canners, who sold fruit juices in cans. If that were true, the amount of the discrimination might well be a proper measure of the buyer's damages. On the other hand, in the case at bar we have as little means of knowing whether or how far the plaintiff passed on to car owners any difference in the price charged it, as we have of knowing how far the addition affected the gallonage that it sold. In *Interstate Commerce Com.* v. *United States*, 289 U. S. 385, it is true that an award to the shipper of the "discrimination" would presumably have ben unlawful, because by hypothesis the rate charged him had been reasonable. Nevertheless, the reasoning of Cardozo, *J.*, in discussing the proper way to measure damages is relevant here. "If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered * * * price * * * damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more" (pp. 390, 391). "Overcharge and discrimination have very different consequences, and must be kept distinct in thought" (p. 390).

At all events the statute should not be read as creating any presumption that "where the fact of damage is shown * * * the pecuniary amount or equivalent of the prohibited discrimination" is the proper "measure of damages." Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Cong., 2d Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention of that part of §13(b) that imposes a burden of proof on the seller as to the effect of a "discrimination." * Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors;

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* **Samuel H. Moss, Inc. v. Federal Trade Commission**, 148 F. 2d 378 (2 Cir.), cert. denied 326 U. S. 734; **Federal Trade Commission v. Standard Brands, Inc.**, 189 F. 2d 510, 515 (2 Cir.).

especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also pay him a fine in double the amount of his loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear.

In view of what we have said it is not necessary to consider whether the defendant proved its defense under the proviso to §13(b). All the evidence was so fully developed that there is no reason for another trial.

Judgment reversed; complaint dismissed.

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JOHN T. FEY, Cle

No. 882

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENTERPRISE INDUSTRIES, INC.,

Plaintiff-Appellee,

v.

THE TEXAS COMPANY,

Defendant-Appellant.

PETITION FOR RE-HEARING

UNITED STATES COURT OF APPEALS
FILED
JAN 22 1957
A. DANIEL FUSARO CLERK
SECOND CIRCUIT

WALLACE R. BURKE
and Plaintiff-Appellee
Attorney for Petitioner

SAMUEL STEINBERG, ESQ.
of Record.

United States Court of Appeals

FOR THE SECOND CIRCUIT

ENTERPRISE INDUSTRIES, INC., Plaintiff-Appellee, *against* THE TEXAS COMPANY, Defendant-Appellant.	Docket No. 24045 No. 21, OCTOBER TERM, 1956

PETITION FOR RE-HEARING

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Enterprise Industries, Inc., the plaintiff-appellee above-named, presents this, its petition for a re-hearing in the above-entitled case, and, in support thereof, respectfully shows:

I

The Court, in its opinion of reversal herein, has failed to allow the plaintiff-appellee an opportunity to produce evidence of its damages pursuant to the rule laid down in its opinion.

II

The plaintiff-appellee respectfully states that evidence of its damages pursuant to the rule set forth in this case may be available, and the dismissal of its complaint precludes it of the opportunity to produce such evidence. Prior to the rendition of this Court's opinion, there was no clear rule of law setting forth the manner in which damages in such an action should be shown.

WHEREFORE, upon the foregoing grounds, it is respectfully argued that this petition for re-hearing be granted, and that the matter herein be remanded to the United States District Court of Connecticut for the purpose of hearing the evidence relative to the damages of the plaintiff-appellee.

WALLACE R. BURKE
Attorney for Petitioner and Plaintiff-Appellee

CERTIFICATE OF COUNSEL

I, Wallace R. Burke, attorney for Enterprise Industries, Inc., do hereby certify that the foregoing petition for a re-hearing of this case is presented in good faith and not for purpose of delay.

WALLACE R. BURKE
30 Farmington Avenue
Hartford, Connecticut